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Supreme Court, U.S.
FILED
AUG 28 1997
CLERK

No. 97-188

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

ODIE WASHINGTON, Director,
Illinois Department of Corrections,

Petitioner,

v.

ANTHONY EARL HALL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Anthony Hall asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari and to proceed *in forma pauperis*. Petitioner has been granted leave to so proceed in both the U.S. District Court and the U.S. Court of Appeals. Pursuant to Rule 39.1, no affidavit is attached, inasmuch as the U.S. Court of Appeals appointed counsel for Petitioner under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Anne E. Carlson

ANNE E. CARLSON
One of the Attorneys for Respondent

COUNSEL FOR RESPONDENT:

Richard E. Cunningham
Counsel of Record
3445 North Janssen Avenue
Chicago, IL 60657
(773) 472-0096

Anne E. Carlson
3312 North Oakley Avenue
Chicago, IL 60618
(773) 477-9177

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD E. CUNNINGHAM,
Counsel of Record
3445 North Janssen Avenue
Chicago, Illinois 60657
(773) 472-0096

ANNE E. CARLSON
3312 North Oakley Avenue
Chicago, Illinois 60618
(773) 477-9177

Counsel for Respondent

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Anthony Hall respectfully requests that this Court deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (Wood, J.; Cummings, J.; and Rovner, J.)

STATEMENT OF THE CASE

While the Respondent's Statement of the Case is essentially correct, some additional facts may prove helpful to the Court in its consideration of the State of Illinois' Petition for Writ of Certiorari.

Following Anthony Hall's conviction of murder, he waived his state right to jury sentencing. Following the jury waiver, the trial court allowed defense counsel six weeks to prepare for the bench sentencing hearing. During this six-week period, neither attorney

visited Mr. Hall to prepare for sentencing. Indeed, neither attorney claimed even to have spoken with Mr. Hall during this same period. Calls to defense counsel from individuals offering to testify on Mr. Hall's behalf at sentencing were not returned.

Prior to commencement of the sentencing hearing, Mr. Hall informed the court that, (during the six week period when his attorneys had not been in touch with him) he had spoken with another attorney who had explained Illinois' jury sentencing scheme and that he wished to withdraw his earlier waiver. Mr. Hall's request was denied.

At the sentencing proceeding, defense counsel called three witnesses: Mr. Hall, whose testimony the court had found incredible at trial; a psychiatrist who testified that Mr. Hall was anxious about the possibility of being sentenced to death; and a combination dentist, part-time Jehovah's Witnesses minister who testified that, prior to being charged with murder, Hall had attended Bible study classes for a period of time while incarcerated.

Defense counsel's closing argument at the penalty stage consisted of a generalized attack on the morality of the death penalty.

Having heard defense counsel's case in mitigation and argument, the trial judge stated that there had been a "complete absence of mitigating factors." (R. 1896) The Illinois Supreme Court endorsed this conclusion on direct appeal. (Appendix D-35, -36)

During state post-conviction proceedings, Mr. Hall claimed that he had been denied effective assistance of counsel at his death penalty hearing and in support of his claim presented evidence, through testimony and affidavits, that 10 individuals[1] would have been

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[1] In its Statement of the Case, Illinois repeats an error of the Illinois Supreme by understating the quantity of the mitigating evidence presented during state post-conviction

willing to testify on his behalf at his capital sentencing hearing but that they had never been contacted or asked to testify by defense counsel. In addition to presenting specific character and background evidence, these individuals would have testified that Mr. Hall had previously saved two lives and possibly a third. Additionally, the testimony of a former prison employee would have shown that while incarcerated Mr. Hall was an asset to Corrections personnel.

In denying Mr. Hall's petition for post-conviction relief, the same judge who had previously determined that there had been a "complete absence" of mitigation, now concluded that the testimony of Mr. Hall's 10 mitigation witnesses would have added nothing to what he already knew about Hall. On post-conviction appeal, the Illinois Supreme Court, which had previously endorsed the trial court's conclusion of "a complete absence of mitigating factors" now endorsed the trial court's conclusion that the evidence of the 10 mitigation witnesses would have been "cumulative." (Appendix C-11)

A three judge panel of the Seventh Circuit unanimously concluded that even under the more deferential review required by the Antiterrorism and Effective Death Penalty Act's amendment to 28 U.S.C. § 2254(d)(1), Mr. Hall was entitled to new sentencing hearing because his attorneys' performance at sentencing had fallen below an objective standard of reasonableness and because he had been prejudiced thereby. A unanimous court denied the

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proceedings. (Cert. Pet. 2-3) The affidavits of eight, rather than six, mitigation witnesses were presented to the State courts in collateral proceedings. (PC C. 696-97 (Thomas O'Connor); PC C. 702-03 (Paula Robinson); PC C. 745-46 (Leola Rodgers); PC C. 350-51 (Claretha Hall); PC C. 699-701 (Patricia Rolf Hunt); PC C. 740-41 (Fate Mikel); PC C. 698 (Julian Smith); PC C. 347-48 (Annie Rodgers)) Because the Illinois Supreme Court does not discuss the proposed testimony of a single mitigation witness in its opinion, it is impossible to discern which affidavits were overlooked by that court and now by the State of Illinois.

State of Illinois' Petition for Rehearing.

REASON FOR DENYING THE WRIT

THIS COURT SHOULD DENY THE WRIT BECAUSE THE SEVENTH CIRCUIT'S UNANIMOUS CONCLUSION THAT MR. HALL IS ENTITLED TO A NEW CAPITAL SENTENCING HEARING FULLY COMPORTS WITH A SIMPLE, STRAIGHTFORWARD APPLICATION OF *STRICKLAND v. WASHINGTON*, 466 U.S. 668 (1984).

The State of Illinois (hereinafter "Illinois") appears to argue that a writ of certiorari is warranted in this case because the Seventh Circuit "far exceeded the proper scope of habeas review" when it substituted its opinion as to whether Mr. Hall was prejudiced by his attorneys failure to present certain mitigating evidence at sentencing for that of the State post-conviction court. (Cert. Pet. at 7) Further, Illinois appears to assert that the Seventh Circuit acted improperly when "[d]espite the sentencing judge's clear statement [(made when ruling on the merits of the ineffective assistance of counsel claim during state post-conviction proceedings)] that the additional mitigation would not have changed his mind, the federal court chose to interpose its own speculation of what the trial court might have done . . . ." Respondent uses the word "appears" because Illinois acknowledges that the deferential standard of review of recently amended 28 U.S.C. § 2254(d)(1) does not apply; seems, at least at one point, to recognize that *Strickland v. Washington*, 466 U.S. 668 (1984) controls; and, at the conclusion of its petition writes (somewhat inconsistently) that "it is now clear that the *de novo* standard was appropriate in this case." (Cert. Pet. at 7, 8, 11)

Whatever the precise nature of the State's argument, it is clear that the Seventh Circuit's analysis squares precisely with that mandated by this Court in *Strickland*. There, the

Court held that whether a habeas petitioner has been prejudiced by defense counsel's substandard performance is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. This holding was recently reaffirmed in *Thompson v. Keohane*, 116 S. Ct. 457, 465 (1995). The Court has also acknowledged that no special deference is owed to State court's assessment of prejudice simply because the issue arises in the context of federal habeas proceedings and that the proper standard of review by the federal court is *de novo*. See *Wright v. West*, 505 U.S. 277, 301-02 (1992) (O'Connor, J. concurring in judgment, joined by Blackmun, Stevens, JJ. (discussion by Justice O'Connor of her opinion in *Strickland*). In fact, in *Strickland* itself, this Court reviewed the prejudice issue *de novo*. *Strickland*, 466 U.S. at 699-700.

Illinois seemingly attempts to circumvent *Strickland* by confusing both the nature of the post-conviction proceedings, and the role of the state court judge in those proceedings. Illinois repeatedly refers to the post-conviction judge (while deciding the legal merits of Mr. Hall's ineffective assistance of counsel claim) as a "factfinder" or "trier of fact" and to the judge's prejudice analysis as a "finding," "factual finding," "finding of fact" or a "reweighing" of the evidence. (Cert. Pet. at i, 3, 7, 8, 9) Significantly, Illinois does not point to a single "basic, primary, or historical fact" which was not accorded the necessary presumption of correctness by the Seventh Circuit, *see Thompson*, 116 S. Ct. at 464. Rather, Illinois complains that the post-conviction's judge's ultimate conclusion that "there [was] no reasonable probability that the sentence would have been different" (Cert. Pet. 5) was not deferred to by the Seventh Circuit. However, as this Court has recognized, the "uniquely legal dimension" of the ultimate issue of prejudice in *Strickland* claims places it outside former § 2254(d)(1)'s domain. *See Thompson,* 116 S. Ct. at 465.

Perhaps Illinois is arguing that, because the judge who sentenced Mr. Hall to death later stated during collateral proceedings that the new mitigation evidence would not have affected his prior decision, the case is distinguishable from, and therefore not governed by, *Strickland*. If this is Illinois' argument, it is without merit as a virtually identical argument was rejected in *Strickland* itself. In *Strickland*, this Court specifically held that the sentencing judge's *post hoc* statements during collateral proceedings concerning as to how new mitigating evidence would or would not have affected his sentencing decision were irrelevant to the prejudice analysis. *Strickland*, 466 U.S. at 695, 700. Thus, in this case, Illinois may not rely on the post-conviction judges' statements during post-conviction proceedings to avoid *Strickland*.

Citing *Lewis v. Jeffers*, 497 U.S. 764 (1990), Illinois further argues that "principles of federalism and comity" require deferential review of the "Illinois sentencing court's "findings of fact and application of its own [death penalty] law." (Cert. Pet. at 8) *Lewis* has no application here. *Lewis* established the test for determining whether, given a facially valid aggravating factor, a state court's finding of death eligibility violates the federal constitution. *Lewis* does not stand for the proposition that federal courts must defer to a state court's answer to the constitutional question. On the contrary, in *Jackson v. Virginia*, 443 U.S. 307 (1979) (which dealt with the analogous question of whether a state court violated the constitution by finding a defendant guilty), the court expressly rejected the argument that deference was owed to state court determinations of the constitutional issue and reviewed the issue *de novo*. *See Wright*, 505 U.S. at 303 (1992) (O'Connor, J. concurring in judgment, joined by Blackmun,

Stevens, JJ.)

As discussed above, the sentencing court's findings of fact and its application of Illinois' death penalty law were never at issue in the federal court proceedings. Rather, Mr. Hall claimed, first in state post-conviction proceedings and then in federal court, that he had been denied his federal constitutional right to effective assistance of counsel at sentencing. The State court answered the federal constitutional question in the negative; the Seventh Circuit conducted an independent analysis as required by *Strickland* and concluded otherwise. This straightforward application of *Strickland* hardly presents the type of issue which can be deemed worthy of certiorari.

In the final paragraph of its Petition, Illinois asserts that this Court's intervention is necessary to clarify the meaning of recently amended 28 U.S.C. § 2254(d)(1). The State twice acknowledges that, under *Lindh v. Murphy*, 1997 U.S. LEXIS 3998, the amended provision does not apply in this case. Thus, the interpretation of § 2254(d)(1) is not a justiciable issue here and would violate Article III's (U.S. Const. art. III) limitation of the federal courts' jurisdiction for at least two reasons. First, there is no "controversy" in this case as required by Article III regarding the proper interpretation of § 2254(d)(1). Article III limits the business of federal courts to questions presented in an adversary context. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). At this time, Mr. Hall has no interest in how the Seventh Circuit, or any court, chooses to interpret the amended provision and therefore has no particular interest in taking an adversarial stance against Illinois. Second, any discussion by this Court of the amended provision would constitute an advisory opinion. As this Court has previously acknowledged, its power lies "to correct wrong judgments and not to revise opinions." *Herb*

v. Pitcairn, 324 U.S. 117, 126 (1945). Where the same result would obtain after correcting an erroneous view of the law espoused by another court, this Court's decision constitutes an advisory opinion which the Constitution does not permit. *Cf. Herb,* 324 U.S. at 124-25 (discussing federal court's jurisdiction to revise erroneous state court opinions).

CONCLUSION

For the foregoing reasons, Respondent Anthony Hall, requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

Richard E. Cunningham
Counsel of Record
3445 North Janssen Avenue
Chicago, IL 60657
(773) 477-9177

Anne E. Carlson
3312 North Oakley Avenue
Chicago, IL 60618
(773) 477-9177

Counsel for Respondent,
ANTHONY HALL

ANNE E. CARLSON
Attorney at Law
3312 N. Oakley Avenue
Chicago, Illinois 60618

(773) 477-9177

August 28, 1997

William K. Suter
Clerk, United States Supreme Court
Supreme Court Building
Washington, DC 20543

Re: Washington v. Hall, No. 97-188

Dear Mr. Suter:

Enclosed for filing are the original and ten copies of Respondent Anthony Hall's Motion for Leave to Proceed *In Forma Pauperis*, Brief in Opposition to the Petition for Writ of Certiorari, and Certificate of Service.

Sincerely,

Anne E. Carlson

Anne E. Carlson
One of the Attorneys for Respondent

Enclosures

cc: William L. Browers

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CERTIFICATE OF SERVICE

The undersigned attorney for Respondent Anthony Hall and member of the Bar of this Court certifies that one copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis* was served by U.S. mail, first class, postage prepaid, to Petitioner's counsel William L. Browers, Assistant Attorney General, 100 W. Randolph Street, Chicago, Illinois 60601, telephone number (312) 814-3565, this 28th day of August, 1997. All parties required to be served have been served.

Anne E. Carlson

ANNE E. CARLSON
3312 N. Oakley Avenue
Chicago, Illinois 60618
(773) 477-9177
One of the Attorneys for Respondent